Nos. 14-46; 14-47; 14-49

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

and

UTILITY AIR REGULATORY GROUP,
Petitioner,

and

NATIONAL MINING ASSOCIATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CALPINE CORPORATION, EXELON CORPORATION, NATIONAL GRID GENERATION LLC AND PUBLIC SERVICE ENTERPRISE GROUP, INC.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether it was permissible and reasonable for the Environmental Protection Agency not to consider cost when determining whether it was "appropriate" to regulate coal-fired and oil-fired power plants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, when the statute instead provides for consideration of cost at the time the agency establishes emission standards applicable to those power plants.

RULE 29.6 DISCLOSURE STATEMENT

Respondents Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc., are publicly traded corporations and have no parent companies. No publicly-held company owns 10% or more of their stock. Respondent National Grid Generation LLC is a wholly-owned subsidiary of KeySpan Corporation. KeySpan Corporation is a wholly-owned subsidiary of National Grid USA. National Grid USA is wholly-owned by National Grid North America Inc., which is wholly-owned by National Grid (US) Partner 1 Limited. National Grid (US) Partner 1 Limited is wholly-owned by National Grid (US) Investments 4 Limited, which is wholly-owned by National Grid (US) Holdings Limited, which is wholly-owned by National Grid plc. National Grid plc is a publicly traded corporation that has no parent companies, and no publicly-held company holds 10% or more of its stock.

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Respondents Calpine Corporation, Exelon Corporation, National Grid Generation LLC and Public Service Enterprise Group, Inc. (collectively, the "Industry Respondents"), respectfully submit this brief in opposition to the petitions for writs of *certiorari* filed by the State of Michigan, *et al.* (No. 14-46), Utility Air Regulatory Group ("UARG") (No. 14-47) and the National Mining Association ("NMA") (No. 14-49). The Industry Respondents are engaged in the business of electric generation. Together they represent 80 gigawatts of generation capacity, enough to power over 60 million homes, using coal, oil, gas, nuclear, wind, solar and other generation sources.

INTRODUCTION

Petitioners seek review of a decision upholding the Mercury and Air Toxics Standards adopted by the Environmental Protection Agency ("EPA") on February 16, 2012 ("Toxics Rule" or the "Rule"), 77 Fed. Reg. 9,304. The Toxics Rule requires all coal-fired and oil-fired "electric utility steam generating units" ("units" or "power plants") to achieve emission standards for "hazardous air pollutants," a class of pollutants specifically listed by Congress in Section 112 of the Clean Air Act ("Act"), 42 U.S.C. § 7412. The Toxics Rule establishes consistent national limits on emissions of these pernicious pollutants by power plants. While many power plants are already capable of achieving these standards, others will require additional capital investment in order to meet the standards, and it is expected that some older, less efficient plants will retire, reducing the demand for coal. Coal producers, a segment of their power plant customers and a block of states aligned with those interests comprise the coalition seeking this Court's review. Unlike many of

their peers among the petitioners, Industry Respondents made significant investments in their generation fleets to prepare for the Toxics Rule.

Petitioners labor mightily to articulate a basis for this Court's review under its Rule 10, but ultimately their *certiorari* and merits arguments merge into a single contention: that the Clean Air Act required EPA to choose not to regulate hazardous air pollutants from power plants because these pollutants are expensive to control. The statute says nothing of the kind. Petitioners dress up their contention by grossly distorting EPA's benefit-cost analysis, and ask this Court to ignore the enormous health benefits that the Rule will produce because those benefits undermine petitioners' narrative. Of course, that is not how sound benefit-cost analysis works. Even if EPA were to have considered costs when deciding whether to regulate power plants, it could certainly not have ignored well-accepted principles of economic analysis to reach the result urged by petitioners.

Beyond these quantitative errors, petitioners' mischaracterization of the impact of the Toxics Rule is inconsistent with the qualitative demands of the Rule. Congress explicitly directs EPA to impose minimum emission standards based on the performance of existing, operating power plants, and explicitly deprives EPA of any discretion to require less. *See* 42 U.S.C. § 7412(d)(3). Under Section 112, it is the universe of existing power plants that sets the bar for the industry, not EPA. The Toxics Rule ends the free ride for power plant owners that have avoided the expenditures necessary to reduce hazardous air pollutants and have profited at the expense of owners of cleaner generation units, such as the Industry Respondents.

This free ride has been a long one. The electric generation industry has anticipated the Toxics Rule since EPA first determined that it was "appropriate and necessary" to regulate power plants under Section 112 in 2000. Since that time, Industry Respondents and many other industry members have invested in their generation fleets, mindful of the "maximum achievable control technology" standards that EPA has been required to promulgate since 2002 (*see* 42 U.S.C. § 7412(c)(5)), and the short time the Act allows for implementation of those standards (*see id.* § 7412(i)(3)). Companies installed expensive control equipment on plants now capable of meeting the requirements of the Toxics Rule. Companies retired uncontrolled plants and replaced them with natural gas plants, or with increased output at nuclear plants and other cleaner energy alternatives. Companies reconfigured their generation fleets in the investment-backed expectation that EPA would promulgate the regulations plainly required by the Act.

The ten-year delay in the Rule's development has harmed the industry, especially those members who, like Industry Respondents, participate in competitive wholesale power markets, where the massive capital investments necessary to maintain the integrity of the nation's power grid are protected only by foresight dependent on regulatory certainty. Those markets are disrupted when some generators are permitted to externalize the costs of their pollution, reaping higher profits at the expense of other, cleaner generators. Even as it improves public health, the Toxics Rule finally levels the playing field for power plant owners. This equity will be lost if this Court disturbs EPA's thoroughly-considered, technically-justified, reasonable application of Section 112. The petitions for *certiorari* should be denied.

STATEMENT OF THE CASE[1]

A. The Economics Of Pollution Control In Electric Generation

The efficacy of pollution control requirements in the electric power sector is profoundly affected by the economic structure of the nation's electric system. All power plants are connected to the nationwide network of electric transmission lines commonly referred to as the "grid." The grid is capable of transmitting electricity across state lines and even across entire regions in order to satisfy demand. The grid is managed by independent system operators, regional transmission organizations and local balancing authorities ("grid operators") who bear the responsibility for assuring that adequate electricity is always available. Grid operators must balance the amount of electricity generated with electricity demand in real time, as the grid itself has no storage capacity, and an imbalance between supply and demand can overload transmission lines or yield voltage drops that can cause potentially massive blackouts.[2] This balance must be struck by taking into account many factors, including the magnitude, timing and location of demand, the availability

1. Industry Respondents refer the Court to the description of the case in EPA's brief in opposition to the petitions, and adopt the Statements in the briefs in opposition filed by the Commonwealth of Massachusetts, *et al.* ("State Resp. Br.") and American Academy of Pediatrics, *et al.* ("AAP Br."). Industry Respondents also offer the following additional background information.

2. The New York Blackout of 2003 was caused by just such an imbalance. NY ISO, *Blackout August 14, 2003 Final Report* (Feb. 2005), http://www.nyiso.com/public/webdocs/media_room/press_releases/2005/blackout_rpt_final.pdf.

of transmission lines serving those demand areas, the available capacity of power plants and, in areas served by competitive energy markets,[3] the price at which generators offer their electricity for sale.[4]

Because demand and supply must be balanced at all times, it is essential that the system include enough generation capacity to satisfy the largest expected electricity demand, plus a margin of safety, to assure an uninterrupted electric supply. The generation fleet, therefore, is sized according to peak demand. However, peak demand rarely occurs, typically only during extreme heat or cold. At all other times, there is a surplus of generation capacity on the system. Because of the need for real-time balancing, when there is a surplus of generation capacity, not all power plants can be allowed to run. The responsibility for choosing which power plants run and which sit idle falls to the grid operator.

Grid operators use a market-based mechanism to determine the order in which to call upon or "dispatch"

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3. More than 60% of the electricity supplied to the grid is delivered through competitive wholesale electricity markets. *See* ISO/RTO Council, *The Value of Independent Regional Grid Operators* at 9-10 (Nov. 2005), http://www.nyiso.com/public/webdocs/media_room/press_releases/2005/isortowhitepaper_final11112005.pdf. In areas served by local balancing authorities, cost plays essentially the same role on an intrastate basis as described below for larger competitive markets, and power can still be imported from other states.

4. *See* Federal Energy Regulatory Commission, *Centralized Capacity Market Design Elements*, Commission Staff Report AD13-7-000 (Aug. 23, 2013), http://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf.

power plants to feed electricity to the grid.[5] No power plant can operate unless it is dispatched by the grid operator. Each owner of a generating unit submits a bid to the grid operator indicating the price at which it is willing to run its unit. Typically, the bid will be no more than the unit's marginal operating cost, which consists of fuel and other variable costs associated with producing electricity. All other things being equal, the grid operator then dispatches power plants by selecting the least expensive generation units first and calling upon progressively more expensive units until demand is satisfied.

The price that each generator receives for the power it produces is not ordinarily established by its own bid. Wholesale markets operate on the principle of the "single market clearing price." All generators are paid the same price based on the bid of the last unit that "cleared the market," that is, the most expensive unit needed to meet demand.[6] This pricing scheme creates a powerful dual incentive to reduce operating costs: units with low operating costs and low bids are both dispatched more frequently than units with higher costs and higher bids, and produce a higher profit margin when they do operate. This incentive serves to reduce wholesale electricity prices to their minimum, but has negative implications for air pollution control.

The operation of pollution control systems can entail significant operating costs for higher-priced fuels,

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5. *See* PJM, Energy Market, http://pjm.com/markets-and-operations/energy.aspx (last visited Oct. 10, 2014).

6. *See* Ross Baldick, *Single Clearing Price in Electricity Markets* (Feb. 2009), http://www.cramton.umd.edu/papers2005-2009/baldick-single-price-auction.pdf.

treatment chemicals, waste disposal and power and water consumption, in addition to any capital costs that may be involved. Hence, power plants operating pollution controls tend to have higher operating costs, resulting in higher bids and less frequent dispatch compared to uncontrolled units. Every power plant that incurs additional costs to reduce its emissions is at risk of being undercut by cheaper, dirtier plants that do not incur these pollution control costs. Industry Respondents' cleaner, environmentally-controlled generation units can be more expensive to own and operate than uncontrolled units, and so are placed at a disadvantage in electricity markets where they compete against higher-emitting units with lower operating costs, such as uncontrolled coal-fired plants.

If all competing power plants faced identical regulatory requirements, operating costs for pollution controls might make little difference, but these requirements vary from plant to plant. For each generation unit, the applicable standards for conventional pollutants are determined by the year of the unit's construction. *See, e.g.*, 40 C.F.R. pt. 60 subpt. Da (new source performance standards for fossil fuel-fired units).[7] New units are required to be equipped with state-of-the-art controls, and must operate those controls to meet more stringent mandatory permit limits. Older plants are required to meet only the far less stringent limits in place at the time they were built. More than half of the coal-fired units in operation in 2010,

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7. New source performance standards contain emission standards for conventional pollutants sulfur dioxide, oxides of nitrogen and particulate matter. *See, e.g.*, 40 C.F.R. §§ 60.42Da-60.44Da. As explained below, it is well understood that emission controls that reduce these pollutants can also reduce certain hazardous air pollutants as well.

representing more than one-third of coal-fired generation capacity, were in existence when the Clean Air Act was enacted in 1970, and the vast majority of those units had no pollution controls.[8]

Pollution control requirements also vary from state to state. Many states impose more stringent pollution control requirements than their neighbors because these controls are needed to attain air quality standards or to serve some other public health goal. In their brief, the State and Local Respondents identify fourteen states that have adopted limits on emissions of mercury, one of the hazardous pollutants limited by the Toxics Rule. State Resp. Br. at III. Indeed, petitioner Michigan had such a requirement in place, but suspended it after EPA adopted the Toxics Rule. *See* Mich. Admin. Code r. 336.2503 (2009); Mich. Admin. Code r. 336.2502a (2013). Of course, if at least fifteen states had mercury limits in place prior to the Toxics Rule, as many as 35 states did not, and power plants in those states enjoyed a price advantage over their more regulated peers.

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8. *See* Comments of Exelon Corporation on U.S. Environmental Protection Agency's Proposed National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units at 7 (Aug. 4, 2011) (Dkt. Nos. EPA-HQ-OAR-2009-0234-17648, -17650, and -17651) (C.A. App. JA00828) (hereinafter "Exelon Comments on Proposed Toxics Rule"); Exhibit 2 to Exelon Comments on Proposed Toxics Rule, Michael J. Bradley, Christopher E. Van Atten, Amlan Saha, & Carrie Jenks (M.J. Bradley & Associates LLC) & Susan F. Tierney & Paul J. Hibbard (Analysis Group), *Ensuring a Clean, Modern Electric Generating Fleet while Maintaining Electric System Reliability* at 20, Tbl. 5 (Aug. 2010) (C.A. App. JA00964).

Most grid operators cover multiple states, and power from one region can be sold into another. Therefore, when it comes to dispatch decisions, power plants do not compete only against plants in the same state, of the same age and subject to the same regulations. They compete against units in other states, including states where pollution control requirements are less stringent. They compete against older units with few if any pollution control requirements. In this price competition, cleaner power plants are dispatched less frequently and make less money when they do run, while dirtier power plants run more often and make more money. The economic calculus of the wholesale electricity market institutionalizes a disincentive to incur costs to reduce air pollution.

B. The Role Of Section 112

Section 112 was adopted in its current form in 1990 concurrently with the Title IV Acid Rain Program, which introduced the first large-scale market-based system for reducing emissions of sulfur dioxide ("SO_2") from coal-fired power plants. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). Title IV did not impose mandatory emission limits on individual power plants, but rather established an allowance trading program to create economic incentives for generators to install and to operate emission controls, especially flue gas desulfurization systems, or "scrubbers," to control SO_2. *See* 42 U.S.C. §§ 7651-7651o. In allowance programs, once the total amount of permissible emissions is determined (in tons per year), an equal number of tradable "allowances" is auctioned or distributed, and each power plant must turn in one allowance for every ton of pollution it emits. The owner of any power plant is free to decide whether to

buy the allowances necessary to cover its emissions, or to reduce its emissions, enabling it to sell surplus allowances to other plants.

Congress adopted Section 112(n)(1)(A) to give EPA an opportunity to assess the impact of, among other things, Title IV on hazardous emissions from power plants before deciding whether they should be regulated under Section 112. *See* 76 Fed. Reg. 24,976, 24,978 (May 3, 2011). Scrubbers installed to reduce SO_2 also reduce hazardous acid gas pollutants, including hydrochloric acid and hydrofluoric acid, and in certain configurations scrubbers will also reduce mercury and non-mercury metals, also hazardous pollutants.[9] Although Title IV prompted the installation of some scrubbers, most plants either switched to low sulfur coal without adding controls, or took no action at all, using allowances to meet their obligations. Only 27 of 261 power plants surveyed by EPA in 1997 installed scrubbers.[10] More than fifteen years later, less than two-thirds of plants had scrubbers, and fewer still had configured their scrubbers to remove hazardous pollutants.[11]

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9. *See* Exelon Comments on Proposed Toxics Rule, Exhibit 7 at 7, A-14 to A-21, Exhibit 4 at 8, 20-21, 23 (C.A. App. JA01042, 01064-01071, 00992, 01004-01005, 01006); *see also* 76 Fed. Reg. at 24,990.

10. U.S. Environmental Protection Agency, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units – Final Report to Congress* at 2-31 (Feb. 1998) (Dkt. No. EPA-HQ-OAR-2009-0234-3052) (C.A. App. JA00537).

11. Exelon Comments on Proposed Toxics Rule at 25 n.47, 50-51, Exhibit 10 at 8-11, Exhibit 2 at 19-20, tbl. 5, Exhibit 4 at 10 (C.A. App. JA00846, 871-872, 1084-1087, 963-964, 994).

Furthermore, much of the control equipment that was installed in response to Title IV and other programs fails to reduce hazardous pollutant emissions because it is not operated consistently. Allowance programs such as Title IV rely on economic incentives to reduce emissions, rather than mandatory limits. When those economic incentives are insufficient to cover the cost of operating pollution controls, even generators who already installed controls operate those controls only to the minimum extent necessary to comply with their permits.[12] For the past several years, allowance prices have been so low that it has been cheaper for many generators to buy allowances rather than to reduce pollution by operating already-installed controls. Neither Title IV nor any other provision of the Act requires or even encourages generators who have thus far avoided installing hazardous pollutant controls to install them now, absent the Toxics Rule. As a result, uncontrolled power plants remain the leading source of many hazardous pollutants in the air we breathe. 77 Fed. Reg. at 9,310.

Section 112 establishes a regulatory process that is unique in the Clean Air Act. First, EPA must determine whether to "list" a category of sources that emits hazardous air pollutants. For virtually all source

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12. Energy Information Administration, U.S. Department of Energy, *The Effects of Title IV of the Clean Air Act Amendments of 1990 on Electric Utilities: An Update*, DOE/EIA-0582(97) at 6-9 (Mar. 1997) (C.A. App. JA03123-3126); *see also* U.S. Environmental Protection Agency, EPA's Responses to Public Comments on EPA's *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units* Vol. 1 at 13 (Dec. 2011) (Dkt. No. EPA-HQ-OAR-2009-0234-20126) (C.A. App. JA02021) ("Response to Comments Vol. 1").

categories other than power plants, EPA must list the category if the sources emit hazardous air pollutants; Congress did not permit EPA to consider cost or any other decision criterion. 42 U.S.C. § 7412(c)(1). Under Section 112(n)(1)(A), EPA must list the power plant source category if it determines that it is "appropriate and necessary" to regulate power plants under Section 112. *See id.* § 7412(n)(1)(A). Section 112(n)(1)(A) likewise does not mention cost as a consideration for this determination. Once a category is listed under Section 112(c), it may only be "delisted" if EPA makes a very specific finding that "no source in the category" emits hazardous pollutants at levels that threaten public health. *Id.* § 7412(c)(9)(B); *New Jersey v. EPA*, 517 F.3d 574, 581-82 (D.C. Cir. 2008). Again, Congress does not mention cost as a consideration in a delisting decision.

Once EPA lists a source category under Section 112, it must develop emission standards for hazardous pollutants emitted by those sources. In contrast with its focus on health-oriented criteria for listing/delisting decisions, Congress established both explicit and implicit roles for cost in determining the standards that EPA must develop for all sources subject to Section 112, including power plants. Section 112(d)(2) requires EPA to establish emission standards that assure the "maximum degree of reduction" that EPA "determines is achievable," "taking into consideration the cost" and other factors. *Id.* § 7412(d)(2). However, Congress explicitly eliminated any EPA discretion in 112(d)(3), establishing a hard floor representing the minimum standards that EPA could require. Section 112(d)(3) requires that emission standards adopted by EPA for existing sources "shall not be less stringent…than…the average emission limitation

achieved by the best performing 12 percent of the existing sources." *Id.* § 7412(d)(3); *see also White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1230 (D.C. Cir. 2014), NMA App. 9a-10a. In mandating these minimum standards, called "Floor Standards," Congress withheld from EPA discretion to relax emission standards based on cost or any other factor that it must consider under 112(d)(2). *See id.*; *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 629, 640 (D.C. Cir. 2000). Nevertheless, cost considerations are necessarily reflected in the Floor Standards, which are based on the performance of existing sources. By definition, the "best performing" sources are achieving the Floor Standards, so the Floor Standards must be cost-effective. *See White Stallion*, 748 F.3d at 1238-39, NMA App. 27a; *see also* State Resp. Br. at III.

REASONS FOR DENYING THE PETITION

A. Petitioners Fail To Articulate A Compelling Reason For *Certiorari*.

1. Petitioners present no "important question of federal law" warranting review.

Properly deconstructed, petitioners' argument for *certiorari* has two components: a single, narrow legal issue, and the factual background that petitioners manufacture to imbue that bland, non-precedential legal issue with illusory significance. The legal issue is routine: whether the Court of Appeals correctly applied the standards articulated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to EPA's interpretation of an ambiguous statutory phrase, here "appropriate and necessary."

Chevron unquestionably remains the controlling authority, having been reaffirmed and applied by this Court since the decision below. The Court of Appeals for the District of Columbia Circuit is the most practiced interpreter of this precedent. The decision below will have no future legal consequences beyond the very narrow scope of the Toxics Rule. The Rule merely adds electric generation to the long list of industries already regulated under Section 112, and so adds hazardous air pollutants to the list of power plant pollutants already subject to regulation. But for petitioners' hyperbolic claims of economic catastrophe, it is impossible to imagine that this Court could find the narrow legal issue presented to be worthy of its consideration. Moreover, the Court of Appeals correctly applied *Chevron*, and the petitions should be denied. State Resp. Br. at I; AAP Br. at I.B.

2. Petitioners' claims regarding the cost of the Toxics Rule are based on a disingenuous mischaracterization of EPA's findings.

Petitioners' arguments are premised on a mischaracterization of the economic consequences of the Rule and EPA's approach to benefit-cost analysis. The three petitioners' briefs are intended to create the misapprehension that EPA found that the Rule would create only a few million dollars of benefits. The real story is quite different: EPA determined that the benefits of the Toxics Rule will be $37 to $90 billion, at least triple the costs of the Rule. 77 Fed. Reg. at 9,305-9,306, and Table 2. Petitioners' rhetoric is not based on a comparison of all benefits to all costs, as proper economic analysis requires. Instead, petitioners exclude all unquantified benefits, and all quantified benefits other than the benefits of

avoided IQ loss for children exposed to mercury through recreationally-caught fish. *See* NMA Pet. at 2 (citing 77 Fed. Reg. at 9,306 Table 2); UARG Pet. at 15-16; Michigan Pet. at 9; 77 Fed. Reg. at 9,428. Nowhere do petitioners offer a legal or scientific rationale for ignoring over 99% of the benefits of the Toxics Rule.

EPA analyzed the costs and benefits of the Toxics Rule under Executive Orders 12866 and 13563, as it must with all major rules. *See* 77 Fed. Reg. at 9,432. The purpose of these orders is to provide a detached, unblinking look at the benefits and costs of rulemaking, direct and indirect, quantified and unquantified. EPA applied best scientific practices and approved, peer-reviewed guidelines, and correctly showed that the benefits of the Rule vastly exceed the costs. *See id.* An independent peer review of EPA's methodology submitted with Exelon's comments on the proposed Toxics Rule confirmed EPA's methodology and found that, if anything, EPA underestimated benefits and overestimated costs.[13]

Petitioners' criticism of EPA's benefit-cost analysis appears to be that it is too inclusive, taking into account all costs and all benefits, but this is exactly the point of the exercise. It is true that the Toxics Rule will yield reductions in conventional pollutants (*e.g.*, fine particulates) in addition to reductions in hazardous pollutants. Congress would not be surprised at that result. After all, Congress acknowledged the link between conventional pollutants and hazardous pollutants in Section 112(n)(1)(A), allowing

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13. Exelon Comments on Proposed Toxics Rule at 39-42, 45-46, Exhibit 21 at 4-5, 10-22, 31-33 (C.A. App. JA00860-863, 866-867, 1242-1243, 1248-1260, 1269-1271).

EPA to assess the impact of Title IV on hazardous pollutant emissions before making its "appropriate and necessary" finding. The link between reductions in these categories of pollution is a matter of fact that no party contests.

Petitioners contend not only that EPA is required to consider benefits and costs of regulation as part of its "appropriate and necessary" finding, but that EPA must exclude from its benefit-cost analysis any benefits that do not arise directly and exclusively from a reduction in human exposure to hazardous pollutants. *See* NMA Pet. at 14, 25; UARG Pet. at 19. This analytical approach would be completely contrary to all generally accepted methods of economic analysis, including EPA's own, peer-reviewed guidelines, and would not survive judicial review.[14]

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14. National Center for Environmental Economics, EPA, *Guidelines for Preparing Economic Analyses* at 11-1 to 11-2 (Dec. 2010), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf. This methodology for determining benefit-cost analysis was peer-reviewed and modified to reflect the comments of the EPA Science Advisory Board. EPA Science Advisory Board, Environmental Economics Advisory Committee, *Advisory on EPA's Guidelines for Preparing Economic Analyses* (2008), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/559B838F18C36F078525763C0058B32F/$File/EPA-SAB-09-018-unsigned.pdf. *See also*, "Combined Brief of (I) Institute for Policy Integrity, (II) American Thoracic Society, American College of Preventive Medicine, American College of Occupational and Environmental Medicine, National Association for the Medical Direction of Respiratory Care, and American College of Chest Physicians, and (III) Environmental Law Professors William W. Buzbee, Jody Freeman, Oliver A. Houck, Richard J. Lazarus, Robert V. Percival, and Zygmunt J.B. Plater, as *Amici Curiae* in Support of Respondent," in *White Stallion Energy Ctr. LLC v. EPA*, D.C. Cir. Dkt. No 12-1100 (Jan. 29, 2013), at 5 (citing E.J. Mishan & Euston

Instead, EPA properly calculated the benefits and costs of the Rule in accordance with universally accepted economic principles. *See* AAP Br. at II.B.

3. The Toxics Rule does nothing more than level the playing field, counteracting the economic disincentive to pollution control, and does not threaten reliability.

Petitioners' unwavering focus on total cost of the Toxics Rule is intended to imply that the emission standards established in the Rule are onerous and unreasonable, but that is not the case. The cost of compliance is a function of the large number of power plants that have escaped regulation and remain uncontrolled; if anything it is an indication of how urgently the Rule is needed. The emission standards in the Toxics Rule are achievable by all types of facilities through the application of widely available and well-understood control technologies already in place at many plants. In nearly every case, EPA imposed only Floor Standards, meaning that the Rule requires power plants to do nothing more than match the performance of their best performing peers. *See* 77 Fed. Reg. at 9,439.[15]

Quah, *Cost Benefit Analysis* 104 (5th ed. 2007), Dallas Burtraw et al., *Ancillary Benefits of Reduced Air Pollution in the U.S. from Moderate Greenhouse Gas Mitigation Policies in the Electricity Sector*, 45 J. Envtl. Econ. & Mgmt. 650, 651 (2003), Richard L. Revesz & Michael A. Livermore, *Retaking Rationality* 55–65 (2008)); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 Mich. L. Rev. 877, 888 (2010).

15. These "best performers" have been equipped with emission controls because they are newer, or because they are in states that have imposed more stringent standards than EPA has heretofore required. *See* 76 Fed. Reg. at 25,022-25,024; *see also* State Resp. Br. at III.

In fact, EPA found that 69 coal-fired units already met all of the Rule's standards, without any further investment. 77 Fed. Reg. at 9,387.[16] Contrary to petitioners' doomsday predictions, these cleaner plants have continued in business, even while suffering a competitive disadvantage to dirty, uncontrolled plants. The Toxics Rule will go a long way to eliminating this disadvantage by requiring those uncontrolled plants to install and operate emission controls.

EPA's nearly exclusive use of Floor Standards is significant for another reason: it contradicts petitioners' portrait of an agency determined to regulate as aggressively as possible. Had that been EPA's motivation, EPA would certainly have adopted more aggressive emission standards under the authority of Section 112(d)(2). 42 U.S.C. § 7412(d)(2). That provision consigns the stringency of emission standards to a series of EPA administrative judgments about achievability, cost, non-air-quality health and environmental impacts and energy requirements, and even expressly authorizes a *prohibition* on hazardous emissions. *Id.* All of these judgments would fall squarely within the protection of *Chevron* deference. Instead of exploiting this potent statutory authority to adopt more stringent standards, EPA imposed the least stringent standards the statute allows. *See* 77 Fed. Reg. at 9,439.[17] The basic process of

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16. *See also*, Response to Comments Vol. 1 at 435 (C.A. App. JA02102).

17. EPA did adopt a more stringent limit on mercury emissions from lignite-fired power plants under Section 112(d)(2). 77 Fed. Reg. at 9,367 tbl. 3. Some petitioners below challenged EPA's application of the decisionmaking criteria in that section, but

setting Floor Standards is largely ministerial: collect emissions data; determine best performing 12%; average results. *See* 42 U.S.C. § 7412(d)(3). The Toxics Rule's Floor Standards are based on real world performance by real operating power plants. They are not based on the sort of result-oriented exercise of administrative discretion of which petitioners accuse EPA. In perfect harmony with the Congressional mandate animating Section 112, it is petitioners' cleaner industry peers that have set the bar for performance under the Toxics Rule, not EPA.

Petitioner UARG suggests that this case has "great national importance" because EPA "brushed aside" "[w]ith little consideration" a litany of concerns raised in comments on the proposed rule, including concerns regarding "electric reliability." UARG Pet. at 33-34. It is undeniably true that many concerns were raised by many parties in the comment process. Most of the concerns recited in UARG's brief are typical economic considerations that were evaluated in EPA's benefit-cost analysis. *Id.* (citing "Economic Hardship" discussion, 77 Fed. Reg. at 9,413-9,414, UARG App. 411a-416a). Far from showing that EPA gave "little consideration" to the comments, EPA's responses demonstrate open-minded consideration of the comments received, some of which resulted in changes in the final rule. *See, e.g.*, 77 Fed. Reg. at 9,376-9,386; *id.* at 9,413 ("The EPA has updated its analysis to reflect the final MATS."). In the end, however, EPA must base its actions on its own well-considered, thorough analysis, informed but not controlled by the comments it receives.

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the Court of Appeals unanimously rejected their claims. *White Stallion Energy Ctr.*, 748 F.3d at 1251, NMA App. 53a.

EPA gave especially close attention to the issue of electric reliability. In the final rulemaking, EPA summarized the many comments it received on this issue, some suggesting the Rule would compromise reliability, some suggesting the opposite.[18] 77 Fed. Reg. at 9,406-9,407, UARG App. 379a-383a. EPA painstakingly addressed each of these concerns, adjusting its own analysis of plant retirements based on revisions to the final rule and concluding in the end that the Toxics Rule would not adversely affect reliability. 77 Fed. Reg. at 9,407-9,411, UARG App. 383a-402a. EPA found more than adequate evidence in the administrative record to support its conclusion.[19]

UARG cites in its brief a one-page 2014 news bulletin regarding power plant retirements predicted in a preliminary modeling report by the U.S. Energy Information Agency. UARG Pet. at 20, 34. This information does not come from the administrative record, but more importantly it does not prove any error in judgment on EPA's part. In fact, the lead line of the article points the blame for retirements on other causes, with no mention of the Toxics Rule or any other regulatory burden: "Coal-fired power plants in the United States have been under

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18. *See* Exelon Comments on Proposed Toxics Rule at 21-38 (C.A. App. JA00842-859).

19. EPA offered even more fulsome analysis of this issue in its repsonses to comments. *See, e.g.*, U.S. Environmental Protection Agency, EPA's Responses to Public Comments on EPA's *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units* Vol. 2 at 290-96 (Dec. 2011) (Dkt. No. EPA-HQ-OAR-2009-0234-20126 (Attachment)).

significant economic pressure in recent years because of low natural gas prices and slow electricity demand growth."[20] As UARG certainly knows, the decision to retire a power plant is a complicated one that involves many factors. Environmental regulatory requirements are relevant factors, but so are fuel costs, electricity demand and prices, facility age and many more. At the present time, the greatest threat to financial viability of coal-fired plants is not the Toxics Rule or any other environmental regulation, but low electricity prices due to increased availability of cheap natural gas.[21] EPA properly determined that the Toxics Rule does not pose a threat to electric reliability.

B. EPA Faithfully Followed Congress' Instructions With Respect To Cost.

1. EPA's approach is consistent with the statutory structure.

It is important to all businesses that agencies take cost into account when they regulate, and Industry Respondents are no different. However, the scope of agency discretion is delineated by Congress. As this Court has recognized, Congress does not always expressly forbid

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20. U.S. Energy Information Administration, Today in Energy, AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 Than Have Been Scheduled (Feb. 14, 2014), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=15031 (last visited Oct. 12, 2014).

21. U.S. Energy Information Administration, Annual Energy Outlook 2014, IF-34 (Apr. 2014), *available at* http://www.eia.gov/forecasts/aeo/pdf/0383(2014).pdf.

or require agencies to consider cost. More commonly Congress says nothing about cost at all, silence that this Court has taken as a signal that Congress chose not to "tie the agency's hands as to whether cost-benefit analysis should be used." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009). EPA's consideration of cost in determining emission limits, but not in determining whether to regulate power plants, is consistent with the statute and this Court's precedent. It is petitioners who argue for a radical departure from that precedent. Petitioners ask the Court to adopt a new universal judicial rule that *requires* all agencies to consider cost in every stage of a regulatory decision, unless the statute explicitly forbids consideration of cost. *See* UARG Pet. at 30. Petitioner UARG argues that the Court "has never squarely faced" this issue, *id.* at 30, but it has, and each time the Court has eschewed a bright line rule such as the one petitioners urge the Court to adopt here. *See, e.g.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 469 (2001); *Entergy Corp.*, 556 U.S. at 221-23; *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-58 (1976).

Even in the very narrow context of Section 112(n)(1)(A), the rule that petitioners seek would conflict with Congress' carefully constructed scheme. In Section 112, Congress established explicit stages in the standard-setting process, and prescribed different roles for cost in each. In Section 112(d)(2), Congress directed EPA to adopt standards that reflect the "maximum reduction ... achievable," but expressly required EPA to consider cost and other factors. 42 U.S.C. § 7412(d)(2). In contrast, in Section 112(d)(3), Congress directed EPA to calculate the Floor Standards without regard to cost or any other factor, basing those minimum standards only on data from existing sources. *Id.* at § 7412(d)(3). These data-driven

Floor Standards consider cost implicitly, but EPA cannot consider cost as a basis to relax these standards. *See White Stallion*, 748 F.3d at 1239, NMA App. 27a; *Nat'l Lime Ass'n.*, 233 F.3d at 640.

Contrary to this scheme, petitioners argue that EPA can, and indeed must, consider cost when determining whether to regulate hazardous pollutants from power plants to begin with. This cannot be so. Congress explicitly withheld from EPA any discretion to use cost as a reason to relax the Floor Standards. Congress certainly could not have intended to require that EPA use cost as a reason not to regulate these sources at all. Otherwise, the constraints Congress imposed in Section 112(d)(3) would be illusory; if EPA concluded that the minimum standards were too costly, EPA could simply decide, as petitioners urge, not to impose *any* standards. Congress, not EPA, made cost irrelevant until all sources meet the minimum standard dictated by the best performing sources, and only after this bar is cleared may EPA consider cost. State Resp. Br. at I; AAP Br. at I.B.

Furthermore, as a practical matter, EPA cannot reliably assess compliance costs until after listing, when it develops emission standards. Until EPA determines the Floor Standards, and considers requiring additional emission reductions under Section 112(d)(2), EPA cannot possibly fulfill its statutory mandate to evaluate "the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements[.]" *See* 42 U.S.C. § 7412(d)(2). This analysis requires a detailed understanding of what emissions limits are achievable, what equipment will be required to achieve those limits, and what impacts on health and the

environment will result. Under Petitioners' interpretation, EPA would be required to formulate emission standards in order to assess costs, even before determining whether to regulate power plants at all.

2. The cost burdens of the Toxics Rule are distributed equitably, and in a manner consistent with Congressional intent.

Congress' vision of Section 112 could not be more clear from its structure. By tethering the minimum emission standards to the best performing sources, Congress ensured that the worst polluters in each category would be forced to upgrade their facilities. In the electric power sector, this leveling scheme will not only improve human health and air quality, but will improve the operation of the electric power markets, eliminating counterproductive incentives that increase pollution.

Petitioners portray the costs of the Toxics Rule as monolithic, and invoke an ironically populist theme that all electricity consumers will bear the burden of these costs. Michigan Pet. at 2, 12. The real world is not so simple. As explained above, uncontrolled power plants have enjoyed a price advantage in electricity markets that has allowed them to run more frequently and reap higher profits than similar plants required to operate emission controls. Air quality is one casualty of this price advantage, but owners of cleaner generation units such as Industry Respondents have also suffered direct economic harm, though their impacts on the environment have been smaller.

The Toxics Rule will go a long way to eliminate this inequity. The costs of the Rule will fall primarily on power

plant owners that have done the least to control emissions, and reaped the greatest economic advantage from their underperformance. At the other end of the spectrum, the best performing power plants already meet the standards. Those best performers should expect to run more often, a boon both to air quality and to their shareholders. Because there is ordinarily surplus generation capacity on the system, these changes in cost structure are not always shifted directly to retail electricity consumers, as petitioner Michigan suggests. *See* Michigan Pet. at 2, 12. Rather, the increased operating costs that the Toxics Rule will impose on previously uncontrolled power plants will change the *order* in which power plants are dispatched, not necessarily the price that will be paid to generators during off-peak periods. With all power plants operating under the same emission standards, the electricity market will still function to minimize cost, but consumers will no longer pay for that minimized cost with their health. The economic burden of the Toxics Rule will rest on the worst performing power plants, in accordance with Congress' design.

CONCLUSION

Petitioners argue that this Court should discard its nuanced, contextual approach to statutory interpretation and respectful observance of the Separation of Powers reflected in *Chevron* and its progeny. They argue that the Judicial Branch should adopt a bright line rule requiring the Executive Branch to consider cost absent an explicit Congressional prohibition. They argue that the Court should redefine the statutory criteria on which the Toxics Rule is based despite the overwhelming public health benefits promised by the Rule. And petitioners seek

these radical departures from precedent in the service of the most parochial of interests: to protect the economic advantage enjoyed by uncontrolled coal-fired power plants, even at the expense of human health. The decision of the Court of Appeals was correct on the merits, and the petitions for writs of *certiorari* should be denied.

Respectfully submitted,

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